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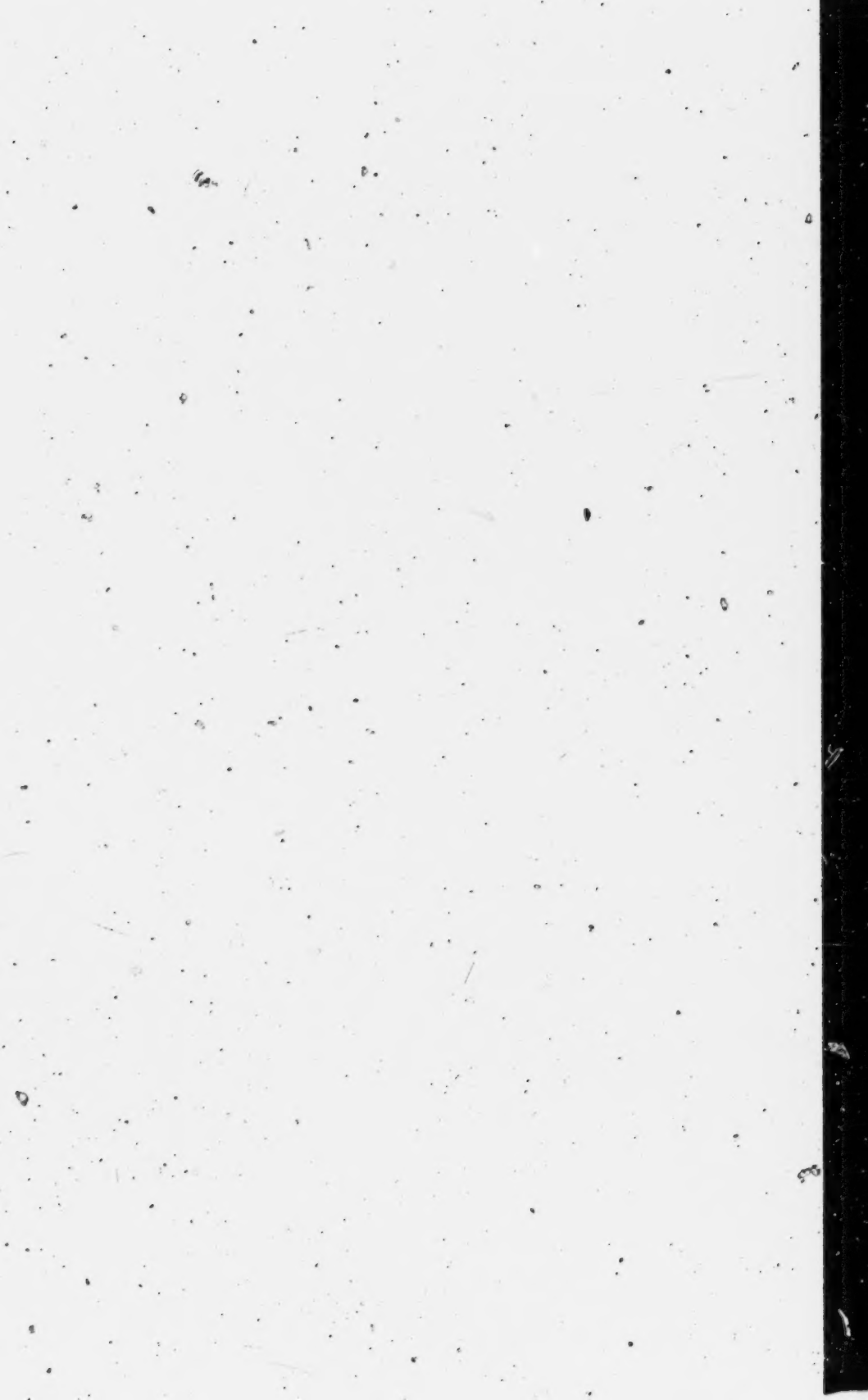
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In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 221

THE UNITED STATES OF AMERICA AND THE SECRETARY OF AGRICULTURE, APPELLANTS

v.

F. O. MORGAN, DOING BUSINESS AS F. O. MORGAN SHEEP COMMISSION COMPANY, ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI

BRIEF IN SUPPORT OF APPELLANTS' PETITION FOR A STAY AND SUPERSEDEAS PENDING APPEAL

OPINION BELOW

The opinion of the District Court of the United States for the Western District of Missouri is unreported.¹

¹ Because the record on appeal has not yet been printed, it has been impossible to insert the appropriate record references.

JURISDICTION

The final order and decree of the District Court was entered on June 18, 1938. Appellants have filed a statement of jurisdiction pursuant to Rule 12, paragraph 1, of the rules of this Court.

STATEMENT

This appeal arises in connection with fifty individual suits (consolidated by stipulation of the parties for the purpose of trial and other proceedings) which were brought in the United States District Court for the Western District of Missouri to suspend, enjoin, set aside, and annul an order made by the Secretary of Agriculture on June 14, 1933, prescribing maximum rates to be charged by market agencies at the Kansas City stock yards. The order was made by the Secretary in a proceeding entitled *Secretary of Agriculture v. L. B. Andrews, doing business as L. B. Andrews Live Stock Commission Company, et al.*, Bureau of Animal Industry, Docket No. 311, instituted under the Packers and Stockyards Act, 1921 (c. 64, 42 Stat. 159 *et seq.*, 7 U. S. C., c. 9, Sections 181-229).

The District Court sustained the order of the Secretary and entered a decree of dismissal, but on April 25, 1938, this Court rendered an opinion reversing the decree of the District Court (58 Sup. Ct. 773). The Court found that the order was procedurally defective but expressly refrained from passing any judgment upon its merits.

The United States and the Secretary of Agriculture (the appellants here) requested a rehearing on the ground (among others) that important questions as to the distribution of moneys impounded in the custody of the District Court remained undetermined. The appellants contended that the procedural irregularity did not require or justify the distribution of the impounded funds before there had been a determination of the rights of the parties on the merits. (Petition for Rehearing, pp. 9-15, and Memorandum in Reply to Memorandum in Opposition to Petition for Rehearing, pp. 4-12.)

The market agencies (the appellees here) in opposing a rehearing asserted that this Court by its decision on April 25, 1938, had held, and held correctly, that the impounded funds belonged to the appellees and should forthwith be released to them. But in denying a rehearing, this Court carefully pointed out that it had not so decided; stating (58 Sup. Ct. 999, 1001):

The second ground upon which a rehearing is sought is that there is impounded in the District Court a large sum representing charges paid in excess of the rates fixed by the Secretary. The Solicitor General raises questions both of substance and procedure as to the disposition of these moneys. These questions are appropriately for the District Court and they are not properly before us upon the present record. We have ruled that the order of the Secretary is invalid

because the required hearing was not given. We remand the case to the District Court for further proceedings in conformity with our opinion. What further proceedings the Secretary may see fit to take in the light of our decision, or what determinations may be made by the District Court in relation to any such proceedings, are not matters which we should attempt to forecast or hypothetically to decide.

On June 2, 1938, the Secretary of Agriculture issued an order reopening the proceeding in which the controverted order of June 14, 1933, was entered, with a view to correcting the procedural irregularity and determining whether or to what extent the order of June 14, 1933, might be validated, after according to the appellees every right to which this Court had held them to be entitled.

Whereupon, the appellants—the United States and the Secretary of Agriculture—on June 11, 1938, made a motion in the District Court to have all further proceedings stayed and the Clerk of the District Court directed to retain the funds impounded until such time as the Secretary, proceeding with due expedition, should have entered a final order in the proceedings reopened by him. The District Court denied the motion and on June 18, 1938, entered an order directing that the funds be distributed to appellees. It is this order from which the present appeal is taken.

The funds in question, amounting to approximately \$580,000, were impounded in the registry

of the District Court pursuant to the terms of a temporary restraining order which the court entered on July 22, 1933. The funds so impounded represent the excess of the rates and charges collected by petitioners between July 24, 1933, and November 1, 1937, over and above the rates and charges found to be reasonable by the Secretary of Agriculture in the order which he made on June 14, 1933. The impounding ceased on November 1, 1937, because on that date a new schedule of rates agreed upon by the Secretary of Agriculture and the market agencies became effective. The pertinent provisions of the impounding order follow (R. 128):²

Provided, however, that the petitioner shall deposit with the Clerk of this Court on Monday of each and every week hereafter while this order, or any extension thereof, may remain in force and effect and pending final disposition of this cause, the full amount by which the charges collected under the Schedule of Rates in effect exceeds the amount which would have been collected under the rates prescribed in the Order of the Secretary, together with a verified statement of the names and addresses of all persons upon whose behalf such amounts are collected by petitioner.

On the same date that the District Court entered the order and decree from which appellants have

² This record reference is to *F. O. Morgan et al. v. United States and the Secretary of Agriculture*, No. 581, October Term, 1937.

appealed, it also entered a decree setting aside the Secretary's order and permanently enjoining its enforcement. In that decree, however, the District Court retained jurisdiction so that—

such other proceedings-[may] be had herein in conformity to the opinion of said Supreme Court with reference to the distribution or restitution of funds deposited by plaintiffs in the Registry of this Court with the Clerk thereof pursuant to the provisions of the temporary restraining order entered on the 22nd day of July, 1933, as to law and justice may appertain. * * *

This decree properly left the cause open for further proceedings in conformity with the mandate and opinion of this Court; for that reason appellants were not aggrieved by the decree and have not appealed therefrom.

An order allowing appeal from the order of June 18, 1938, was entered by the District Court on June 30, 1938. On the same day, however, the District Court denied appellants' motion for an order staying the enforcement of the order of June 18, 1938, pending the appeal to this Court.

Appellants thereupon applied to Mr. Justice Butler for an order staying and superseding the District Court's order of June 18, 1938, pending appeal. By order entered July 15, 1938, Mr. Justice Butler has referred this application to the Court, and pending a decision by the Court on the application, has stayed and superseded the order of the District Court.

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred:

1. In denying appellants' motion requesting the Court to enter an order staying all further proceedings herein and to direct the Clerk of said District Court to retain in his custody the moneys impounded in said court pursuant to its interlocutory order of July 22, 1933, and continued in effect from time to time thereafter, by further orders of the court, until such time as the Secretary of Agriculture proceeding with due expedition shall have entered a final order in the proceeding reopened by him by an order dated June 2, 1938, and such final order shall have become of competent jurisdiction.

2. In granting appellees' motion for restitution of all impounded funds theretofore deposited by them with the Clerk of said court between July 24, 1933, and November 1, 1937, pursuant to the terms of a temporary restraining order issued by the said court on July 22, 1933, and extended from time to time thereafter.

3. In holding that as a matter of law the funds now impounded in the custody of the Clerk belong to appellees.

4. In holding that the said funds were deposited with the said Clerk upon the clear understanding that if the order of the Secretary dated June 14, 1933, should be held invalid and its enforcement enjoined the said funds would be returned to appellees.

5. In holding that as a matter of law the Secretary of Agriculture has no authority in the circumstances of this case to make an order, effective as of June 14, 1933, which will determine reasonable rates and charges for the period between July 24, 1933, and November 1, 1937.

6. In directing the distribution to appellees of the said impounded moneys prior to a determination upon the merits by the Secretary of Agriculture or by the court of the ultimate ownership of said moneys.

7. In directing the distribution to appellees of the said moneys now impounded in the custody of the Clerk prior to any determination upon the merits by the Secretary of Agriculture or by the Court of the reasonableness of the rates and charges under which the said moneys were collected by appellees from their patrons.

ARGUMENT

We have shown in the brief in opposition to the motion to dismiss or affirm that the order here involved is appealable as a matter of right. It is so appealable not only because it was entered upon a misconstruction of the mandate of this Court but also because it is an order incidental to the main suit and final in form and effect. Since the order is appealable and since, consequently, the motion to dismiss should be denied, it follows as of course that a stay pending disposition of the appeal should be granted.

The District Court has ordered distribution of the impounded funds to appellees without according the Secretary of Agriculture the reasonable opportunity he requested to correct his procedural error and to validate his order so far as the facts and the law may justify. The precise question to be decided on this appeal is whether the District Court erred in ordering such distribution. Manifestly, if pending this Court's decision of this question the funds are distributed, the Court in determining whether the order of distribution was erroneous would be deciding an abstract question. If this Court denies a stay and later holds the District Court's order was erroneous, the reversal would be wholly bootless; the erroneous order, carried into effect by the denial of the stay, would be reversed to no avail. Thus it is essential to the preservation of this Court's appellate jurisdiction that the stay be granted; for although technically, perhaps, the immediate distribution of the impounded funds might not destroy the Court's jurisdiction, it would quite effectively render impotent any decree of this Court reversing the order, and would in substance deprive appellants of their right of appeal.

This Court clearly has the power to prevent such a result, and it has repeatedly intervened to preserve its appellate jurisdiction. *French v. Shoemaker*, 12 Wall. 86, 100; *In re Alexander McKenzie, Petitioner*, 180 U. S. 536, 551; *United States v. Shipp*, 203 U. S. 563, 573; *Omaha & C. B. St. Ry. Co. v.*

Int. Com. Comm., 222 U. S. 582, 583. Indeed, it may well be urged that supersedeas would operate automatically in this case (*cf. Goddard v. Ordway*, 94 U. S. 672); but whether or not that is true, it is abundantly clear, for the reasons already urged, that a stay should be granted as of course under the circumstances of this case.

There are, moreover, other considerations which should move the Court to stay the order under review. This is not the appropriate place to discuss the merits of appellants' case, but the Court will have seen from the statement of jurisdiction and from the brief in opposition to the motion to dismiss or affirm that substantial and important questions of administrative law are involved. A stay of the District Court's order will be operative only for the few additional months that will elapse before this Court can decide the merits of the controversy. Impounding was discontinued on November 1, 1937, when the new rates went into effect, so that there is no present obligation resting upon appellees to place additional collections in escrow. Moreover, should the stay be now denied and the impounded funds distributed, restoration of the funds to the custody of the District Court, in the event that the order under review is reversed, would involve manifest practical difficulties. Substantial injustice would accrue to the farmers whom appellants represent were a procedural error permitted in its practical effect to

immunize the appellees from their substantive obligations under the Packers and Stockyards Act. Furthermore, adjudication of all the issues between the parties in one proceeding comports with traditional equitable principles. And behind the instant controversy lies the important principle of administrative justice to which appellants have adverted in their previous briefs. This Court has often shown its unwillingness to permit mistakes in administrative procedure to foreclose interests which deserve protection. *Atlantic Coast Line v. Florida*, 295 U. S. 301; *Mahler v. Eby*, 264 U. S. 32; *Tod v. Waldman*, 266 U. S. 113. *A fortiori*, this Court should not foreclose such interests without full argument by failing to grant a stay pending appeal. Principles of equity as well as this Court's power to preserve its appellate jurisdiction combine to prevent a precipitous termination, without regard to the substantive rights of the parties, of a controversy that has been continuously in litigation for the past five years.

CONCLUSION

Appellants' petition for a stay and supersedeas should be granted.

Respectfully submitted.

ROBERT H. JACKSON,
Solicitor General.

AUGUST 1938.